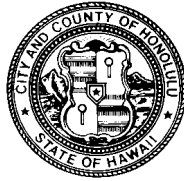


**ETHICS COMMISSION  
CITY AND COUNTY OF HONOLULU**

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**ADVISORY OPINION NO. 2020-3**

**I. SUMMARY**

In 2020, the general election ballot featured two questions relating to the Honolulu Ethics Commission (“Commission”). The Commission created a Frequently Asked Questions (“FAQs”) flyer to inform and educate the public about two ballot questions. The Commission then created an internal memo addressing the Commission’s authority to inform the public about the ballot questions.

The Commission met on October 21, 2020, and decided to issue its internal memo as an Advisory Opinion.

**II. BACKGROUND**

The Revised Charter of the City and County of Honolulu 1973 (“City Charter”) defines each city agency’s powers and duties. In 2019 and 2020, the Honolulu City Council (“Council”) introduced two resolutions to amend the City Charter that would affect the Commission’s powers and duties.<sup>1</sup> Resolution 19-331 would affect the Commission’s budget, and Resolution 20-083 would affect the Commission’s staffing. The Commission publicly testified at Council hearings in support of both resolutions.

After both resolutions were adopted, they were placed on the November 2020 general election ballot. A majority of yes votes is needed on a question to pass.

Question 3 asked “Shall the Revised City Charter be amended to allow the Honolulu Ethics Commission to control its own budget after it has been enacted?”

Question 4 asked “Shall the Revised Charter be amended to require ethics commission staff to be appointed based on merit principles, but exempt them from the civil service position classification plan, and to have the salaries of all ethics commission staff set by the ethics commission, subject to specified limitations?”

On August 19, 2020, the Commission discussed whether it could communicate with the public about the ballot questions and wanted to be clear it was not advocating for the ballot questions. After the Council passed the resolutions and thus placed the questions on the ballot, the

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<sup>1</sup> City Council adopted Resolutions 19-331 and 20-083 on July 8, 2020.

Commission could not urge voters to vote a particular way on the questions. *See* Advisory Opinion No. 2009-06.

The Commission consulted with the Department of the Corporation Counsel and created a ballot question FAQs flyer (see Exhibit A). The Commission posted the FAQs on its website, tweeted on social media, and emailed to members of the public who selected to receive Commission communications.

### **III. ISSUES AND SHORT ANSWER**

1. Whether the Commission has the authority to inform the public about questions on the general election ballot that relate to the Commission?

Yes. The Commission's authority to inform the public on the ballot questions comes from the powers and duties granted to the Commission.

2. Whether the Commission's FAQs can be interpreted as informing the public, rather than advocating for the ballot measures?

Yes. The FAQs flyer does not contain explicit words of advocacy, nor is it so one-sided that it can only be interpreted as advocating for the ballot questions.

### **IV. ANALYSIS**

#### **A. The Commission Has the Implied Authority to Inform the Public on Ballot Questions Relating to the Commission.**

As a general rule, elected officials may not use City time and resources to urge voters to vote a certain way on a ballot question. *See* Advisory Opinion No. 2009-06. However, public officials may use resources for a legitimate city purpose if expressly or implicitly authorized to do so. *Id.*

The City Charter and Revised Ordinances of Honolulu ("Ordinances") define a city official's or agency's duties and empower such official or agency to carry out those duties. If the City Charter or Ordinances states that the official or agency has the authority to publicly comment about questions on the ballot, then the official or agency is expressly authorized to do so. *See* Advisory Opinion No. 2009-06.

Even if the City Charter or Ordinances do not expressly authorize the official or agency to publicly comment on ballot questions, the official or agency may still have the implied authority to do so. Advisory Opinion No. 2009-06. The analysis begins by looking at the City Charter and Ordinances for an official's or agency's powers and duties. If a ballot question involves the manner in which the official or agency carries out its powers and duties, then the official or agency has the implied authority to publicly comment on the question. *See Rees v. Carlisle*, 113 Hawaii 446, 453 (2007) (holding that the prosecutor had the implied authority from his power and duty to prosecute crimes to publicly comment on ballot measures that implicated the manner in which he could initiate prosecutions). If the ballot question affects the official's or agency's core functions, then the official or agency may publicly comment on the question.

In this case, neither the City Charter nor the Ordinances granted the Commission the express authority to publicly comment on the ballot questions. The Commission, however, analyzed whether it had the implied authority to publicly comment on such questions. The Commission's powers and duties are defined in both the City Charter and Ordinances. The Commission has the powers to: appoint staff and consultants as necessary to perform its duties; hold hearings and conduct investigations; render advisory opinions; and impose civil fines or recommend appropriate disciplinary actions upon violation of standards of conduct. RCH § 11-107. Additionally, the Commission has the power to submit to the mayor and council recommendations and reports that "pertain to the standards of conduct...or to any other matter relating to the fostering and maintenance of ethical conduct." ROH § 3-6.3(f). Finally, the Commission has the power to adopt, amend, and repeal rules and regulations that the Commission deems appropriate for carrying out its powers, duties, and functions. ROH § 3-6.3(i).

The Commission examined whether the ballot questions involved the manner in which the Commission carried out its powers and duties. Question 3 related to the Commission's budget, and ROH § 3-6.3 grants the Commission the power to adopt and amend rules and regulations that the Commission deems appropriate for carrying out its functions. Question 4 related to staff classifications and salaries, and RCH § 11-107 grants the Commission the power to appoint staff as necessary. Therefore, the Commission's power to publicly comment on ballot questions that implicate the manner in which the Commission spends its budget and appoints staff is fairly implied from the Commission's power and duty to adopt and amend rules that the Commission deems appropriate for carrying out its functions. *See* Advisory Opinion No. 2009-06; 113 Hawaii at 453.

**B. The FAQs Created by the Commission Can Be Reasonably Interpreted as Informing the Public on the Ballot Questions.**

Although the Commission may have the implied power to publicly comment on a ballot question, it is limited by RCH § 11-104, which prohibits the use of public resources for partisan political purposes. Advisory Opinion No. 2009-06; Advisory Opinion No. 2002-5. Partisan advocacy includes communications with express words of partisan advocacy, such as "vote yes" or "vote no," that urge voters to vote a certain way on a particular issue. Advisory Opinion No. 2009-06; *see also* *Rees*, 113 Haw. at 453. Partisan advocacy can also implicitly urge voters to vote a certain way without using express words of advocacy if a communication is heavily one-sided and can only reasonably be interpreted as urging voters to vote a certain way. Advisory Opinion No. 2009-06. Those kinds of materials are the functional equivalent of partisan advocacy and cannot be financed with public funds. *Id.*; *see Federal Election Commission v. Wisconsin Right To Life*, 551 U.S. 449, 469-70 (2007); Advisory Opinion No. 2009-06.

In this case, the Commission created an FAQs flyer for the ballot measures (see Exhibit A). First, in order to determine whether the FAQs constituted impermissible partisan advocacy, the Commission looked for express words of advocacy. *See* Advisory Opinion No. 2009-06; *see also* *Rees*, 113 Haw. at 453. The FAQs had no language that expressly urges voters to vote "yes" on the ballot questions. Thus, there was no basis to conclude that the FAQs violated RCH § 11-104.

Second, the Commission did a close reading of the FAQs to determine whether it was the functional equivalent of partisan advocacy. *See* Advisory Opinion No. 2009-06. The two-page FAQs flyer (attached as Exhibit A) contains 18 questions and answers about the two ballot questions.


The FAQs include information about the legislative history of the resolutions that led to the questions; how the questions benefit the public; and how the questions affect the Commission. The FAQs also include background information on the Commission and how votes are counted.

The Commission concluded that the FAQs flyer is not so one-sided that it can only be reasonably interpreted as an appeal to “vote yes” on the ballot questions. The FAQs painted a positive picture of the ballot questions by emphasizing their benefits to both the public and Commission, but provided enough additional factual information to allow it to be interpreted as something other than a “vote yes” communication. *See* Advisory Opinion No. 2009-06. Because the FAQs flyer is fact-based, voters may form different opinions on the two ballot questions. *See id.* For example, the FAQs flyer explains that the public will benefit if the ballot questions are passed because they grant the Commission greater independence and enhanced capability to do its job. However, voters may decide that the ballot questions are not necessary because the Commission does not need greater independence, or that the Commission is already adequately doing its job. Additionally, because the FAQs link to the resolutions that led to the ballot questions, voters may go directly to the Honolulu City Council website to learn more information from a non-Commission source.

Overall, the Commission concluded that the ballot measures FAQs flyer was not so one-sided that it could only be read or interpreted as a “vote yes” communication.

## **V. CONCLUSION**

For the reasons discussed above, the Commission has the implied authority to inform and educate the public about questions on a general election ballot when those questions involve the manner in which the Commission carries out its powers and duties. Additionally, the Commission’s FAQs flyer is authorized because it contains factual and balanced statements that can be reasonably interpreted as informing and educating the public, rather than advocating for or against passage of the ballot questions.



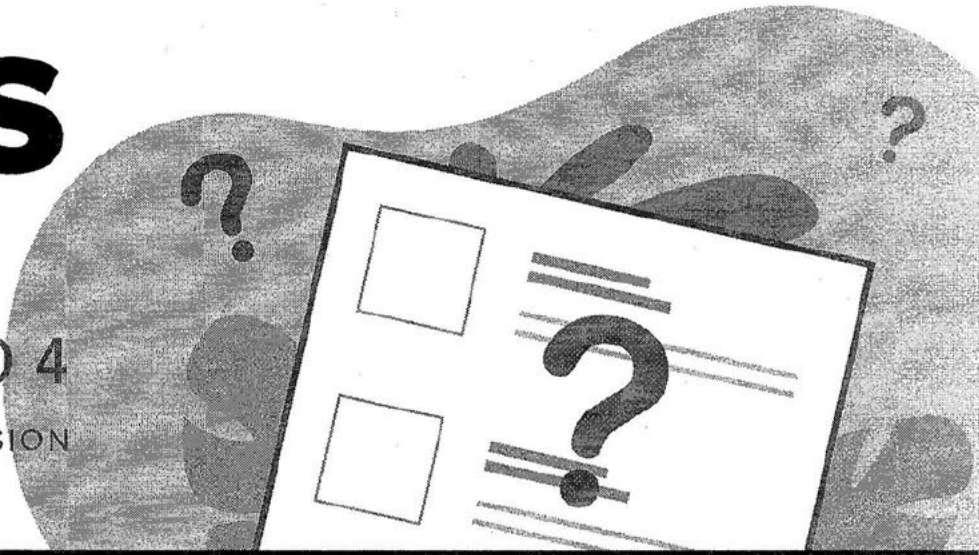
VICTORIA S. MARKS, Chair  
Honolulu Ethics Commission

DATED: December 16, 2020

# FAQs

## 2020 BALLOT QUESTIONS 3 AND 4

HONOLULU ETHICS COMMISSION



**Q1. What are the two City Ethics Commission questions on the ballot?**

Questions 3 and 4 propose City Charter changes relating to the Honolulu Ethics Commission.

Question 3 asks: "Shall the Revised City Charter be amended to allow the Honolulu Ethics Commission to control its own budget after it has been enacted?"

Question 4 asks: "Shall the Revised Charter be amended to require ethics commission staff to be appointed based on merit principles, but exempt them from the civil service position classification plan, and to have the salaries of all ethics commission staff set by the ethics commission, subject to specified limitations?"

**Q2. Why are there two questions on the ballot, instead of one?**

Ballot questions start out as "resolutions" introduced by the City Council. The Council passed two Commission-related resolutions to change the Charter—Reso 19-331 (on Commission budget flexibility) and Reso 20-83, FD1 (on ethics staff positions and salaries).

**Q3. What is the purpose of Question 3?**

Question 3 would give the Commission budget flexibility and independence after the Council approves and appropriates funds annually. The Commission would use the funds to carry out its city ethics duties and fulfill its strategic plan of increasing ethics staff.

**Q4. What is the purpose of Question 4?**

Question 4 would allow the City Ethics Commission to create the staff positions it needs and set staff salaries, within limits.

**Q5. Why is a vote needed?**

City law requires that citizens vote to change the Charter.

**Q6. How will City residents benefit if the ballot questions pass?**

The Commission would have greater independence and enhanced capability to do its job—to ensure that city officers and employees demonstrate the highest standards of ethical conduct so the public may have trust and confidence in the integrity of government.

**Q7. Will this give the City Ethics Commission flexibility?**

Yes. If Question 3 is passed, the Commission will have greater budget flexibility and independence to use funds approved by Council to carry out its ethics duties. If Question 4 is passed, the Commission will be able to create the ethics staff positions it needs and set staff salaries, within limits.

# EXHIBIT A: FAQ FLYER

**Q9. Does Question 4 take Commission staff out of the Civil Service regulations?**

No, Commission staff are not currently civil service employees. Staff are “exempt” employees, meaning that the Commission may hire and terminate staff at any time without cause.

Question 4 does not change this status.

**Q10. How do the proposed changes affect the Commission’s budget?**

The proposed changes give the Commission more independence and control over its budget.

**Q11. What percentage of votes is needed for this to pass?**

A majority of votes is needed for each question to pass.

**Q12. How are blank votes counted?**

Blank votes are not counted as either yes or no.

**Q13. Is this the first time either issue has been introduced to the general public for a vote?**

Yes.

**Q14. Who introduced Resolution 19-331, the basis for Question 3, and why?**

Councilmember Tommy Waters introduced the resolution out of a desire to support the City Ethics Commission and to promote and reinforce the idea that ethics should be a priority for the City and County of Honolulu.

**Q15. If these questions pass, when would the changes take effect?**

Question No. 3 on the Commission’s budget would take effect on July 1, 2021.

Question No. 4 on ethics staff positions and salaries would take effect on January 1, 2021.

**Q16. What does the City Ethics Commission do?**

The Commission ensures that all of Honolulu’s approximately 10,000 elected leaders, appointed officials, and employees understand and follow the highest ethical standards of conduct governing their work for the public. The Commission educates, advises, and enforces city ethics laws and lobbyist regulations.

**Q17. What’s the difference between the Honolulu Ethics Commission and the Hawaii State Ethics Commission?**

The Honolulu Ethics Commission is the City and County of Honolulu’s ethics watchdog agency for city officers and employees. The Hawaii State Ethics Commission is the State of Hawaii’s ethics watchdog agency for state officers and employees.

**Q18. Where can we get more information?**

For more information on the Honolulu Ethics Commission, go to the Honolulu Ethics Commission website:

**<http://www.honolulu.gov/ethics>**

To look up Resolutions 19-331 (on Commission budget flexibility) and 20-83, FD1 (on ethics staff positions and salaries), go to the Honolulu City Council website: **<http://www.honolulu.gov/council>**